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THE MAKING OF ONE'S OWN EXEMPLARS
THE POST LITEM MOTAM RULE AS ILLUSTRATED BY CALIFORNIA

By Marcel Matley

Many handwriting experts take requested exemplars from a writer in order to obtain proof to support this writer's claim to have written or to have not written the disputed signatures or handwriting. The editorial board alerts you to an established universal rule that a party may not voluntarily make one's own handwriting exemplars after the dispute has risen in order to prove one's own case or support one's testimony on the issue of handwriting. However, the opposing party may request, or the court may order, a party to provide such exemplars. The rule would be the same for both civil and criminal cases.

"*Post litem motam*" is a Latin phrase which literally means "*after suit (is) moved.*" In English it can be taken as the equivalent of both "*after the dispute has arisen*" and "*after litigation has begun.*" The editorial board offers this brief survey of all relevant California cases which we could find. If someone wishes to survey relevant cases from another jurisdiction, we would gladly supply any citations we might know of for that jurisdiction in order to help start the research. We invite a submission of a paper resulting from such research.

Gulzoni v Tyler et al. 64 CA 334 (1883)

The Supreme Court ruled that post litem motam exemplars are not admissible for the purpose intended, without saying they are not admissible at all.

At page 336: "It was error to permit the plaintiff to write his name in the presence of the jury for the avowed purpose of having the jury compare, and then permitting them to compare his signature, written in their presence, with his signature to a release signed by him about the time of his receiving his injuries, in order 'to show the nervous condition of the witness at the time of the accident."

"We know of no rule which would sanction a comparison of handwriting for such a purpose. Besides, if there was a material difference between the handwriting of the plaintiff at the different dates, there was at least a liability that some of the jurors might have been led to doubt the genuineness of the signature to the release, which was not denied."

Thus the earliest California case which we could find on the subject does not really address the viewpoint we are considering.

People v Briggs, 117 CA Ap 708, 4 P2 593 (1931)

Defendant appealed his conviction for molesting a 12-year old girl, Edith Eifert, who was in his custody.

A note was introduced into evidence, purportedly from Edith saying she and her sister should tell a lie to have their guardian go to jail, so that the girls would not be sent to a convent. Edith denied having written it. At page 594 the Third District Court of Appeal says: "There were,

however, presented and allowed in evidence numerous writings admittedly those of the witness, Edith, for comparison with the disputed writing above set forth, and we have had the original exhibits produced in this court and have carefully compared and studied the handwriting of Edith Eifert, and if called upon to express our opinion as to whether or not the disputed document is in her handwriting, we would unhesitatingly say that it is."

At trial, the prosecutor was permitted to recall Edith, after the case was closed by both parties, so she could write for the jury to prove that she did not write the disputed note. After saying, "This, we think, was prejudicial error," at page 595 the Court says: "The rule is well settled that a witness is not permitted to write his signature in the presence of the jury for the purpose of having the same compared with a signature purporting to be his, the genuineness of which he denies."

"It would open wide the door for fraud if a witness were permitted to corroborate his own testimony by preparation of specimens of his own handwriting for the purpose of comparison. Hickory v U. S., 303, 14 S. Ct. 334, 38 L. Ed. 170"

151 U.S. 303

The Court cites *U.S. v Jones*, 10 F 469, as another case in which the defendant was not permitted to introduce a writing made in the presence of the jury in order to prove he had not written an incriminating letter. *Williams v State*, 61 AL 33 (1878), is also discussed in support of the same proposition.

People v Golembiewski, 25 CA Ap 2 115, 76 P2 717 (1938)

In explaining why post litem motam exemplars are inadmissible, the Court of Appeal says at page 719: "[I]t would open too wide the door for fraud, if a witness were allowed to corroborate his own testimony by preparation of specimens of his writing for the purpose of comparison. By design a correspondence with, or departure from the disputed writing could be fabricated; and whether there was such design, is an enquiry with which the jury should not be embarrassed."

The Court notes that defendant could have brought in officers from where he banked to testify whether he wrote the signature in question, but did not.

People v Sauer, 163 CA Ap 2 740, 329 P2 (1958), cert[1] denied 359 US 973, 79 S Ct 888, 3 L Ed 2 839 (1959)

Starting at page 965, the Third District Court of Appeal reviews *People v Briggs* and *People v Golembiewski* in their rulings that post litem motam signatures are not admissible for purposes of comparison.

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[1] cert = certiorari means a discretionary device used by the Supreme Court to determine which cases it will hear.

Two witnesses for the prosecution testified that their names on certain checks were not written by them. They had written exemplars for the prosecution expert in order to support their testimony, and the expert had used those exemplars. At page 966 the Third District Court of Appeal ruled: "We think it was error to permit the handwriting expert to use post litem motam signatures of Warner and Copeland as a basis of comparison but we do not believe that this error requires a reversal of the judgment. The record shows that the handwriting expert used other signatures which were not post litem motam and also that both Warner and Copeland testified that the signatures on the questioned checks were not there signatures. In view of this testimony and the other testimony in the case, together with the fact that appellant did not testify, we do not believe that the fact that the court permitted a number of post litem motam signatures to be used along with others as a basis for comparison resulted in a miscarriage of justice."

People v Hess et al, 10 CA Ap 3rd 1071, 90 CA Rptr 265, 43 ALR 643 (1970)

Defendants were convicted for fraudulently obtaining duplicate registration papers for an Arabian horse and then selling another less valuable horse, which its owner had boarded with them, as the Arabian. One defendant was ordered by the court to provide exemplars in the backhand writing style used to forge the bills of sale. He refused, and the prosecutor properly argued to the jury that the refusal indicated a consciousness of guilt.

The defense case implied that the forged documents were by a prosecution witness who had had dealings with the defendants. In rebuttal, the People recalled the handwriting expert who compared the disputed writings with exemplars which were made by the prosecution witness after litigation began.

At page 649 the Fourth District Court of Appeal stated: "As a general rule, a handwriting specimen made for the occasion, and post litem motam, may not be used for comparison purposes, and admission of opinion evidence based upon such comparison to corroborate a witness' testimony is error. However, as appellants concede, the forged handwriting in this case was disguised in a backhand slant. Positive identification or elimination by comparison with the forged documents required exemplars written in backhand. Since none of the persons upon whom suspicion focused... naturally wrote in backhand, obviously no such pre-existing handwriting specimens were available."

"The rule barring use of post litem motam handwriting specimens is not universally followed. It is subject to the exception which permits a cross-examiner to demand and use a handwriting sample obtained in open court. We think the rule presupposes existing samples, adequate for comparison purposes, will normally be available, and we doubt the rule should be applied where the questioned writing is in a disguised style precluding the pre-existence of samples which will enable an expert to make a definitive analysis. In any event, the evidence of appellants' guilt is overwhelming, and their explanation of what transpired is completely unconvincing. If error occurred in connection with the admissibility of the handwriting testimony, we are convinced no miscarriage of justice occurred." [Citations omitted. Emphasis added.]

The speculative part of the opinion, in the sentence beginning, "*We think the rule presupposes*," is at odds with any case considering post litem motam exemplars known to the editors. We doubt that it could be taken as a legal ruling or precedent. It would be interesting to have the thoughts of an attorney who has mastered this aspect of case law.

An interesting historical footnote. The various rulings of the trial judge in this case were so often corrected upon appeal that he was known in the San Diego area as "Wrong-Again-Johnnie."

People v Villarino, (1970) 7 CA Ap 3 56, 86 CA Rptr 338 (1970)

Defendant's wife, as witness for the defense, claimed to have filled in and signed the forged checks. At page 66 the Fourth District Court of Appeal says: "As a part of her cross-examination, Mrs. Villarino, over objection by defendant, was asked to and did sign her own name and the names of H. Foster and Mrs. L. E. Eubanks. She had on direct examination testified she had placed the name of H. Foster on the forged checks."

"On cross-examination of a witness who has testified to placing a signature on a questioned document, it is proper to have the witness write the same name and to give other samples of handwriting for comparison with the signature testified to."

The Court distinguished such a situation from that where a witness writes in the presence of the jury on direct examination to support one's own testimony. *People v Golembiewski* is quoted to the effect that such would open the door for fraud, whereby the person could deliberately alter one's writing either to change it from a denied writing or to match a claimed writing. The passage from *Golembiewski* about avoiding embarrassment to the jury is repeated. Wigmore is quoted to the effect that it is the opponent who requests such in-court exemplars who will suffer any unfairness from them, and the other party could hardly object to the opponent accepting the risk involved.

On rebuttal, the handwriting expert for the prosecution, having compared the exemplars, which Mrs. Villarino had made on cross-examination, with the forged checks, concluded that she had not written and signed them. Lest anyone think the lady was motivated by other than true love, at page 61 we read of further rebuttal testimony: "Defendant's sister-in-law testified that Mrs. Villarino, on the day she testified and before testifying, had told the witness...she was going to take all the blame for Ernie because she couldn't be without him for any length of time."

People v Harris, 39 CA Ap 3 965, 114 CA Rptr 892 (1974)

The defendant appealed a conviction for issuing two checks of insufficient funds. At trial, a handwriting expert identified defendant as the writer of the two checks, as well as of a motel registry for his wife and himself under an assumed name. Part of the appeal was that the handwriting expert improperly used exemplars written after charges were filed. At page 971 the Fifth District Court of Appeal addresses that issue:

"Appellant relies on *People v Hess*...to argue that 'it was error for the trial court to order appellant to submit handwriting exemplars and have those exemplars received into evidence.' The *post litem motam* rule to which appellant alludes applied only to a handwriting specimen offered by the person making it as a standard of comparison with the disputed writing for the purpose of corroborating his testimony. In forgery and similar prosecutions, *post litem motam* exemplars of the defendant may be used, as in this case, by the prosecution to establish an essential element of the crime charged; and the taking of a defendant's handwriting specimen for this purpose does not violate his privilege against self-incrimination." [Emphasis in original; citations omitted]

In summary, exemplars, either collected or requested, are the fundamental writings used as models for writing comparison. The post litem motam rule alerts document examiners to the appropriate use of requested exemplars.

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